NO. 67413-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARCELIS KING,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

A police officer found a gun inside Michael Rosier's car. Rosier claimed Marcelis King put it there and that King had threatened him and his wife with it. King was charged with two counts each of felony harassment and second degree assault based on the same act of allegedly threatening the two complainants with a gun. He was also charged with firearm enhancements for each offense.

At King's trial, the jury was never told that the firearm enhancements required them to be unanimous in their verdict or that they must find the State proved the allegations beyond a reasonable doubt. While deliberating, the jury asked about whether their verdict needed to be unanimous for another charged count, but never received any instruction on unanimity or the standard of proof for the firearm enhancements.

The jury convicted King after the prosecution told them that the complainants would face criminal liability if they were not being truthful, and claimed that the complainants' testified "appropriately" notwithstanding the prying and invasive questions asked by the defense attorney about what happened the night of the incident.

King's convictions must be reversed due to the insufficiency of the evidence as to charges involving Rosier's wife, the double jeopardy violations by imposing convictions for felony harassment and assault based on the same incident, the inadequate charging language used for felony harassment, the lack of unanimous jury verdict supporting the firearm enhancements, and the numerous instances of prosecutorial misconduct in closing argument.

B. ASSIGNMENTS OF ERROR.

1. King's convictions for both felony harassment and second degree assault based the same evidence violate double jeopardy.

2. There was insufficient evidence to prove King committed the essential elements of second degree assault and felony harassment against complainant Ronny Johnson.

3. The court erroneously denied King's motion to dismiss the charges involving Johnson due to insufficient evidence.

4. The charging document failed to include the essential claim of a "true threat" underlying the felony harassment allegations and thereby provided inadequate notice of the necessary elements of that offense.

5. The court lacked statutory authority to impose firearm enhancements when the court did not ask the jury to find the

elements of the enhancement were proved beyond a reasonable doubt.

6. The firearm sentencing enhancements violated King's right to a jury trial under the Sixth Amendment and Article I, sections 21 and 22 when the jury was not instructed to base its verdict on the unanimous agreement that the State proved the elements of the enhancement beyond a reasonable doubt.

7. The prosecution's numerous improper arguments to the jury tainted King's right to a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The state and federal constitutional prohibitions against punishing someone twice for committing the same offense bar the court from imposing multiple sentences when the same evidence is used to prove offenses that contain same essential legal requirements. King was accused of threatening the complainants while holding a gun and this same threat was used as evidence of second degree assault and felony harassment. Does it violate double jeopardy to convict King multiple times for the same act?

2. The essential elements of second degree assault as charged included the perpetrator's specific intent to instill the fear of bodily injury in complainant Johnson. Johnson said King held a gun

by his side, pointed down, and did not say she heard him make any threatening statements. When the prosecution did not present evidence that showed King expressly intended to cause Johnson fear that she would be injured with a weapon, was there insufficient evidence to prove this count of second degree assault?

3. As charged and instructed, the prosecution had to prove that King intended to make a "true threat" to kill Johnson to prove felony harassment for count four. Johnson did not hear King make specific threats and did not see him point his gun at her or her husband. Did the prosecution fail to present sufficient evidence to show King intended that Johnson would reasonably fear he was issuing a "true threat" to kill her when she did not hear him make threats or see him point a gun toward her?

4. To avoid intrusions on protected speech under the First Amendment, only "true threats" may be criminalized. Is the constitutionally-necessary prerequisite that a threat was a "true threat" an essential element of a harassment statute that must be pled in the information and included in the "to-convict" instruction?

5. By statute and under the constitutional right to trial by jury, firearm sentencing enhancements may not be imposed unless the jury's verdict constitutes a unanimous finding that the State has

proved the essential elements of the enhancement and it rests upon a correct instruction of the deliberative process. The court gave no instructions to the jury about how to answer the special verdict form and did not require the answer to be unanimous or based on proof beyond a reasonable doubt. Did the court lack authority to impose the firearm sentencing enhancements?

6. The prosecution denies an accused person the right to a fair trial when it urges the jury to draw negative inferences from the defendant's exercise of his right to cross-examine the complaining witnesses about the incident, inserts facts not in evidence as a basis to bolster the State's case, and disparages defense counsel. Did the prosecution's repeated instances of improper argument deny King a fair trial?

D. STATEMENT OF THE CASE.

Police officer Edward Sagiao searched for the origin of a "hang-up" 911 call even though the caller had not indicated there was a problem. 4RP 134, 143.[1] Sagiao saw two cars parked

[1] The verbatim report of proceedings are referred to herein by the volume number indicated on the cover page, or the date of the proceeding if no volume is listed.

However, the court reporter labeled two volumes as "Volume IX." Accordingly, the volume containing proceedings from later in time is referred to as Volume X, or "10RP."

outside an apartment building, with one car blocking the other. 4RP 149-50. Marcelis King was standing outside the driver's side window of Michael Rosier's car while Rosier sat in the driver's seat. 4RP 33, 35. Sagiao approached the car and Rosier told him there was a gun at his feet. 4RP 43.

Sagiao retrieved the gun, and Rosier said it was King's. 4RP 43. He said King had been holding the gun but he put it into Rosier's car when Sagiao arrived. 4RP 43. King was arrested. The gun was tested for DNA. Several people's DNA was on the gun, but not King's. 7RP 53-54, 64. The gun was unloaded, and had no magazine, but could be fired if the user had another implement to push the bullet into firing position. 7RP 53; 8RP 86-87, 115-16.

Married couple Michael Rosier and Ronny Johnson said they left a local nightclub after it closed and went to their friend Makel Andrews's apartment. 5RP 169-73. While at Andrews's apartment, her boyfriend Curtis Walker arrived, along with King. 6RP 15, 158. Andrews and Johnson went into a back room while Rosier sat at a table with Walker. 6RP 171, 174. Walker appeared "inebriated" and was ingesting cocaine. 6RP 17, 143. Walker also seemed upset that Rosier was there. 6RP 18.

Rosier felt nervous and wanted to leave. 6RP 26. Johnson thought everyone was getting along inside the apartment. 6RP 176, 201. As they left the apartment to go home, Johnson chatted with the others in a friendly way. 6RP 203-04. But when they got into their car, Walker got in too and said, “I’m coming with you.” 6RP 186. After a few minutes, Andrews convinced Walker to leave Rosier’s car. 6RP 31, 180. As Walker went into his apartment, Johnson thought Walker said to King, “don’t let them go.” 6RP 181. Rosier thought Walker said, “I’ll be right back” and “to hold them there.” 6P 33.

According to Rosier, King stood outside his car window as Rosier sat in the driver’s seat. He said King pulled out a handgun and played with it. 6RP 35. Rosier thought he said he would “shoot us.” 6RP 35. He “wouldn’t let us leave.” 6RP 35. Johnson said she dialed 911 on her cell phone but did not talk to the operator because she did not want anyone to know she was calling 911. 6RP 186. Johnson and Rosier both claimed they were afraid they were going to die during this incident. 6RP 33, 184.

The prosecution charged King with two counts of second degree assault with firearm enhancements, two counts of felony harassment with firearm enhancements, and one count of unlawful

possession of a firearm in the first degree. CP 175-78. They also charged Walker with the same second degree assault and felony harassment offenses, under the theory that King was acting at Walker's behest and they were accomplices. Id. King was convicted of all charged offenses but Walker was convicted of the lesser offenses of fourth degree assault and misdemeanor harassment. 9RP 191-94. The court agreed the verdicts were inconsistent but denied King's motion, finding the inconsistency did not entitle him to relief. 10RP 8-9, 14-17.

Pertinent facts are discussed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. **King's multiple convictions for harassment and assault based on the same acts and the same legal elements violated double jeopardy**.

a. Double jeopardy is violated when separate punishments are imposed for the same offense.

The double jeopardy clauses of the state and federal constitutions protect against multiple punishments for the same offense. Blockberger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); In re Personal Restraint of Orange, 152 Wn.2d 795, 816, 100 P.3d 291 (2004); U.S. Const. amend. 5;

Const. art. I, § 9. “Double jeopardy concerns arise in the presence of multiple convictions, regardless of whether resulting sentences are imposed consecutively or concurrently.” State v. Womac, 160 Wn.2d 643, 657, 160 P.3d 40 (2007).

A conviction and sentence violate double jeopardy if, under the “same evidence” test, the two crimes are the same in law and fact. Orange, 152 Wn.2d at 816; State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). A double jeopardy violation occurs when, absent clear legislative intent to the contrary, the evidence required to support a conviction for one would have been sufficient to warrant a conviction for the other. Orange, 152 Wn.2d at 816. The test is not simply whether two offenses have different statutory elements. United States v. Dixon, 509 U.S. 688, 712, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) (conviction for criminal contempt barred prosecution for drug offense); Brown v. Ohio, 432 U.S. 161, 164, 100 S.Ct. 2221, 53 L.Ed.2d 187 (1977) (“separate statutory crimes need not be identical either in constituent elements or actual proof in order to be the same within the meaning of the constitutional prohibition”).

As explained in Orange, proper application of the Blockberger same elements test is focused specifically on “the facts

used to prove the statutory elements" rather than comparing generic statutory language. 152 Wn.2d at 818-19. For example, convictions for rape and rape of a child based on the same act violate double jeopardy even though "the elements of the crimes facially differ." State v. Hughes, 166 Wn.2d 675, 684, 212 P.3d 558 (2009).

In Orange, the Supreme Court held that first degree assault and first degree attempted murder were the same offense where the convictions were based on a single gunshot directed at the same victim. 152 Wn.2d at 820. The substantial step of the attempted murder was shooting at the victim, and the first degree assault was an assault committed by firearm. Id. The evidence required to support the attempted first degree murder was sufficient to conviction Orange of first degree assault. Id. Consequently, the court held that the offenses were the same in law and fact. Id.

b. Second degree assault by creating a fear of injury and felony harassment threatening to injure are the same offense for double jeopardy purposes.

The Legislature has not declared the intent to separately punish a person convicted of both assault and harassment. State v. Leming, 133 Wn.App. 875, 888, 138 P.3d 1095 (2006). Without a clear expression of intent to separately punish the same acts, the

court must construe the elements of the statutes and examine the crimes as charged and proved. See Whalen v. United States, 445 U.S. 684, 694, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); Orange, 152 Wn.2d at 816. This "same elements" or "same evidence" comparison rests on whether "the evidence required to support the conviction for [one offense] was sufficient to convict" King of the other. Orange, 152 Wn.2d at 820.

The elements of second degree assault, as charged, were that King displayed a deadly weapon at both Rosier and Johnson and thereby created a "threat or fear of bodily injury." CP 101, 106; RCW 9A.36.021(1)(c). The to-convict instructions for counts one and two required the jury to find that King "assaulted [Michael Rosier or Ronny Johnson] with a deadly weapon." CP 101, 106. The instructions defined assault as "an act, with unlawful force, done with the intent to create an apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury . . . ." CP 104. King was not accused of actually hitting or striking anyone. 9RP 84.

King was also charged with felony harassment that was "part of a common scheme" and "closely connected in respect to time, place, and occasion" as the assault allegations. CP 176-77. Felony

harassment required proof King threatened to kill Rosier (for count three) or Johnson (for count four), and thereby created a reasonable fear in both complainants that the threat to kill would be carried out. CP 118, 122; RCW 9A.46.020(1)(b).

The evidence supporting the felony harassment was the same evidence required for second degree assault. King held a gun and made threatening comments. Rosier claimed King played with the weapon and showed it to him while standing outside his car door. 6RP 35. Johnson described the weapon as being pointed down, not up or toward her. 6RP 183-84. She did not hear King make threats but she perceived him as threatening from his presence and his possession of the gun. Id.

In Leming, the court held that felony harassment and second degree assault violate double jeopardy when the felony harassment is the basis for the felony assault. 133 Wn.App. at 889. The factual basis for each offense used the same threat to injure the complainant and her fear that the defendant would carry out the threat. Id. As charged in Leming, the second degree assault required an assault that occurred with "the intent to commit" another felony, and this felony was the felony harassment. Id. at 882. The offenses were not strictly identical, because the intent to

commit felony harassment, as required for second degree assault, did not require the completed crime of felony harassment. Id. at 882, 889. But the evidence required to support felony harassment would be sufficient to support the second degree assault. Id. at 889. The court held, "as charged, these two convictions, felony harassment and second degree assault predicated on the same acts of felony harassment, subjected Leming to multiple punishments for the same offense" and violated double jeopardy. Id.

In State v. Mandanas, 163 Wn.App. 712, 717-18, 262 P.3d 522 (2011), this court addressed a double jeopardy claim involving second degree assault and felony harassment. In Mandanas, there were separate acts supporting the two crimes. Mandanas had not only threatened the complainant with a gun, but he also hit him with the gun. Id. at 721. Thus, the assault conviction was based on a separate act of actual battery and not the mere threat of harm, and based on this factual distinction, the court ruled that the convictions did not violate double jeopardy. Id.

Similarly to Leming and unlike Mandanas, the prosecution's evidence rested on the same threatening act for both offenses, without any actual battery. It was King's conduct, in holding a gun,

which instilled the fear that his threat was a threat to kill. 6RP 35, 39-30, 183-84; 4RP 18. Although Rosier thought King also said "he was going to kill me," Johnson did not report hearing King make explicit verbal threats. 6RP 33, 183-84. It was King's conduct in holding a gun that instilled the fear that served as the basis for both second degree assault and felony harassment. The perceived threat to kill was the same threat that created fear and apprehension of bodily injury. Because the same words and conduct that constituted felony harassment were also the basis of the threat and fear of bodily injury, it violates double jeopardy to punish King for both convictions. Leming, 133 Wn.App. at 889.

c. The double jeopardy violation requires the court to strike the lesser offense.

The prosecution conceded that the offenses should be treated as the same criminal conduct. 7/8/11RP 41. Multiple convictions are treated as the "same criminal conduct" when the offenses were (1) committed at the same time and place; (2) involved the same victim; and (3) involved the same objective criminal intent. State v. Tili, 139 Wn.2d 107, 119, 985 P.2d 365 (1999); RCW 9.94A.589(1)(a). The court agreed and treated the offenses as the same criminal conduct, but rejected King's

contention that the two convictions violated double jeopardy. 7/8/11RP 43-44, 55

When two offenses are the same offense for purposes of double jeopardy, simply imposing a sentence on one offense is an inadequate remedy. State v. Turner, 169 Wn.2d 448, 464, 238 P.3d 461 (2010); State v. Womac, 160 Wn.2d 643, 658, 160 P.3d 40 (2007). King's felony harassment convictions should be vacated because they violate double jeopardy.

2. **There was insufficient evidence that King assaulted or threatened Johnson, when she did not claim he made threats to her**

a. The prosecution was required to prove King intentionally threatened Johnson to prove second degree assault and felony harassment

In Washington, the state constitutional right to a trial by jury "provides greater protection for jury trials than the federal constitution." State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 912 (2010); Wash. Const. art. I, §§ 21, 22. The jury must unanimously decide every element of the charged offense after receiving complete and accurate instructions on the law. Williams-Walker, at 896.

The prosecution bears the burden of proving each element of a criminal charge beyond a reasonable doubt. Apprendi v. New

Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 359, 364, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970); State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006); U.S. Const. amends. 6, 14; Const. art. I, § 3. When the sufficiency of the evidence is challenged on appeal, the Court examines all of the evidence and decides whether any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The evidence must be viewed in the light most favorable to the State, with all reasonable inferences construed against the accused. Id. Speculation and conjecture are not a valid basis for upholding a jury's guilty verdict. State v. Prestegard, 108 Wn.App. 14, 23, 28 P.3d 817 (2001).

King was charged with two offenses against Ronny Johnson: second degree assault and felony harassment. Even when taking Johnson's testimony in the light most favorable to the prosecution, there was insufficient evidence he committed either offense.

b. The prosecution did not prove King intentionally assaulted Johnson.

To prove second degree assault against Johnson, the prosecution was required to establish that King assaulted Johnson with a deadly weapon. CP 176; RCW 9A.36.021(1)(c). "Assault" required evidence that King intentionally placed Johnson in fear of bodily injury by use of a deadly weapon. CP 104; 9RP 84.

"To convict a defendant of second degree assault, the jury must find specific intent to create reasonable fear and apprehension of bodily injury." State v. Ward, 125 Wn.App. 243, 248, 104 P.3d 670 (2004). "For instance, a defendant's intent may be inferred from pointing a gun, but not from mere display of a gun." Id. (noting that lesser offense of unlawful display of weapon requires display of weapon "with intent to intimidate").

Yet Johnson did not testify that she heard King threaten her. She said King held a gun "by his pants," and not pointed toward her. 6RP 183-84. When the prosecutor asked, "Was he pointing it at you?" Johnson said, "No." 6RP 184. She further said about the gun, "It just was down." 6RP 184. She did not remember King saying anything about the gun. 6RP 184. The gun was unloaded and had no magazine. 4RP 53.

It is true that Johnson was very afraid during the incident. 6RP 184. She knew King had a gun, even though it was not pointed at her, and she feared she would die. 6RP 193-94. But her fear is only one element of second degree assault. CP 106. The prosecution was required to prove King intentionally instilled that fear of bodily injury in Johnson. CP 106.

Johnson did not describe King threatening her with the gun. Johnson did not describe King acting as if he was going to use the gun. Johnson's fearful response to knowing of the existence of a gun does not establish that King intended to create Johnson's fear of bodily injury, which is an essential element of second degree assault. Ward, 125 Wn.App. at 248.

c. The prosecution did not prove King knowingly placed Johnson in fear that he truly intended to kill her.

Felony harassment requires the prosecution to prove King knowingly threatened to kill Johnson and his threat was reasonably interpreted as "a serious expression of intention to inflict bodily harm upon or to take the life" of another. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2005). Because the First Amendment protects speech, only "true threats" are proscribed by law. State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010); see Kilburn,

151 Wn.2d at 49 (“An appellate court must be exceedingly cautious when assessing whether a statement falls within the ambit of a true threat in order to avoid infringement on the precious right to free speech.”).

The prosecution was required to prove King intended his words and conduct to be interpreted as if he seriously intended to kill Johnson in order to prove that he committed felony harassment against her. The “threat” that underlies a felony harassment conviction must be the threat to kill. The defendant must know he is communicating a threat to kill. See State v. J.M., 144 Wn.2d 472, 481-82, 28 P.3d 720 (2001).

Johnson did not hear King make any threats. She did not testify about any words she heard him use. 6RP 184. The only words she heard were those of Curtis Walker, a co-defendant, who was also charged with felony harassment but was convicted only of misdemeanor harassment. Johnson claimed that Walker told King, “don’t let them go,” when Walker got out of Johnson’s car and walked away. 6RP 181. Thus, Johnson felt that she was not free to leave, which made her afraid for her life.

The fact that King had a gun does not transform Walker’s words into a threat to kill. King did not point the gun toward

Johnson or speak directly to her. 6RP 183-84. The to-convict instruction required the jury to find that King threatened to kill Johnson, not another person, and it was that threat that Johnson feared would be carried out. CP 122. The prosecution failed to prove King expressly threatened Johnson or that he did so with the intent that she perceive his actions as a true threat to kill her.

d. The lack of proof of essential elements of assault and felony harassment require reversal of those convictions.

Where evidence is insufficient to support a conviction, double jeopardy bars retrial for that offense, and the matter must be dismissed. Burks v. United States, 437 U.S. 1, 11, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). The insufficient evidence supporting the second degree assault and felony harassment allegations involving Johnson require reversal.

3. **The "true threat" requirement is an essential element of a harassment offense that must be pled in the information and included in the "to convict" instruction**.

a. Principles of due process require essential elements of an offense be pled in the information and included in the "to convict" instruction.

Real notice of the nature of the charge is "the first and most universally recognized requirement of due process." Henderson v. Morgan, 426 U.S. 637, 645, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976)

(quoting Smith v. O'Grady, 312 U.S. 329, 334, 61 S.Ct. 572, 85 L.Ed. 859 (1941)); U.S. Const. amend. 6; Const. art. I, § 3. Thus, due process requires that all facts essential to punishment – whether statutory or nonstatutory – be pled in the information and proved beyond a reasonable doubt. State v. Goodman, 150 Wn.2d 774, 784, 83 P.3d 410 (2004). At a minimum, "'the defendant would need to be aware of the acts and the requisite state of mind in which they must be performed to constitute a crime.'" State v. Osborne, 102 Wn.2d 87, 93, 684 P.2d 683 (1984) (citation omitted).

Further, the "to convict" instruction must contain all elements essential to the conviction. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). A reviewing court "may not rely on other instructions to supply the element missing from the 'to convict' instruction." State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

b. The "true threat" requirement is an element.

Where a statute "criminalizes pure speech," it "'must be interpreted with the commands of the First Amendment clearly in mind.'" Kilburn, 151 Wn.2d at 49 (quoting State v Williams, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001), and Watts v. United

States, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969)). Only "true threats" may be prohibited without violating the First Amendment. Kilburn, 151 Wn.2d at 43.

This Court has reiterated this basic principle in both the criminal and civil arenas. In re Detention of Danforth, 173 Wn.2d 59, 71, 77, 263 P.3d 783 (2011) (a majority of this Court agrees that a "true threat" is required for civil commitment under RCW 71.09.020); Schaler, 169 Wn.2d at 287-88 (reversing for insufficiency of instruction regarding constitutionally-required mens rea); State v. Johnston, 156 Wn.2d 355, 364-65, 127 P.3d 707 (2006) ("the jury must be instructed that a conviction under RCW 9.61.160 requires a true threat and must be instructed on the meaning of a true threat") (emphases added).

There are cases in which this court has refused to hold that the true threat requirement is an element of a harassment offense. See State v. Atkins, 156 Wn. App. 799, 236 P.3d 897 (2010) (holding that the "constitutional concept" of a true threat merely limits the scope of the threat requirement);State v. Tellez, 141 Wn. App. 479, 484, 170 P.3d 75 (2007) (holding that merely defining the term, "true threat," suffices to protect First Amendment rights). But these cases invert the analysis. The "true threat" requirement does

not "limit[ ] the scope of the essential threat element." Atkins, 156 Wn. App. at 805. Rather, only true threats may support a prosecution under a harassment statute. Virginia v. Black, 538 U.S. 343, 359-60, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003); Kilburn, 151 Wn.2d at 43; Johnston, 156 Wn.2d at 364-65.

While the federal circuit courts are split regarding whether the analysis contains a subjective or only an objective component, the federal courts unanimously agree that the "true threat" requirement is an element. See e.g. United States v. Bagadasarian, 652 F.3d 1113, 1118 (9th Cir. 2011) (discussing application of true threat requirement to prosecution for threats to presidential candidate or former President); United States v. D'Amario, 330 Fed. Appx. 409, 413 (3rd Cir. 2009) (two "essential elements of prosecution" for violation of 18 U.S.C. § 115 are true threat and intent to intimidate); United States v. Fuller, 387 F.3d 643, 647 (7th Cir. 2004) ("the only two essential elements for [a prosecution under 18 U.S.C. § 871] are the existence of a true threat to the President and that the threat was made knowingly and willfully"); United States v. Francis, 164 F.3d 120, 123 n. 4 (2nd Cir. 1999) ("We have routinely used the term "true threat" in setting forth the second element of the crime…"). These decisions are entirely

consistent with the precedent construing the "true threat" requirement. Because only "true threats" may be prosecuted, the "true threat" requirement is an essential element of a harassment statute.

c. The omission of the element was prejudicial error.

The "to convict" instruction "carries with it a special weight" because it is the "yardstick" by which the jury measures guilt or innocence. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). For this reason, the omission of an essential element from the instruction is a manifest error affecting a constitutional right that may be reviewed for the first time on appeal. Id. Here, the omission of this element denied King the notice to which he was constitutionally entitled, and permitted the jury to convict even if it concluded that the young man who allegedly threatened Rosier or Johnson was engaging in mere braggadocio. This Court should conclude the omission of the essential "true threat" element was error.

4. **The court's failure to instruct the jury that the firearm special verdicts required unanimous agreement based on proof beyond a reasonable doubt absolved the State of its burden of proof**

a. The prosecution must prove a firearm enhancement to the jury beyond a reasonable doubt and based on a unanimous verdict.

The State bears the burden of proving each factual element of an offense beyond a reasonable doubt to a unanimous jury, including aggravating factors that authorize additional punishment. State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003) ("As for aggravating factors, jurors *must be unanimous* to find that the State has proved the existence of the aggravating factor beyond a reasonable doubt." (emphasis in original)). The inviolate right to trial by jury requires a jury to reach a unanimous verdict based on accurate instructions. Williams-Walker, 167 Wn.2d at 898; U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 21, 22.

"[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilt beyond a reasonable doubt." Sullivan v. Louisiana, 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). When the jury has not been correctly instructed on the requirement of proof beyond a reasonable doubt, the resulting error is a structural error that requires reversal of the conviction without resorting to

harmless error analysis. Id. at 279-81. The appellate court may not uphold a conviction by hypothesizing that the jury could have applied the right standard. Id. at 279. The same is true with regard to the failure to instruct the jury as to the State's burden of proof or whether unanimity is required, as that lapse vitiates the jury's findings.

Similarly, under the more protective requirements of article I, section 21, the judge is authorized to impose punishment only based on a jury's verdict. Williams-Walker, 167 Wn.2d at 886. When that verdict does not reflect the jury's unanimous agreement that the State met its burden of proof, the verdict does not authorize punishment. Id.; State v. Bashaw, 169 Wn.2d 133, 146, 234 P.3d 195 (2010).

Firearm enhancements may not be imposed unless a unanimous jury finds, beyond a reasonable doubt, the accused or an accomplice possessed a firearm at the time of the commission of the crime. State v. Hennessey, 80 Wn.App. 190, 194, 907 P.2d 331 (1995) ("Before a defendant can be subjected to an enhanced penalty, the State must prove beyond a reasonable doubt every essential element of the allegation which triggers the enhanced penalty."). As the court explained in Williams-Walker,

> a sentencing court violates a defendant's right to a jury trial if it imposes a firearm enhancement without a jury authorizing the enhancement by explicitly finding that, beyond a reasonable doubt, the defendant committed the offense while so armed.

167 Wn.2d at 898. By statute, the jury must decide the essential elements of the enhancement whenever a jury trial is held. RCW 9.94A.825; State v. Recuenco, 163 Wn.2d 428, 439, 180 P.3d 1276 (2008). This jury trial procedure is also mandated by article I, section 21. Recuenco, 163 Wn.2d at 440.

b. The court never instructed the jury that the State must prove the firearm enhancements beyond a reasonable doubt, and the jury must unanimously agree on its verdict.

The court submitted special verdict forms to the jury but did not deliver any accompanying instruction about the special verdict forms. CP 69-71, 81. The face of the special verdict forms did not indicate that the answer needed to be based on unanimous agreement or proof beyond a reasonable doubt. No instruction explained the necessary decision-making process for the special verdict.

The jury was confused about the unanimity requirement with respect to at least one of the charged offenses. CP 82. While deliberating, the jury asked, “Do we need to come to a unanimous

decision of the crime of unlawful possession of a firearm as charged in count V?" CP 82; 9RP 185.

The court responded to the question by telling the jury to "reread the jury instructions including instruction 48." CP 83. When discussing this jury question, one attorney interpreted the question as indicating the jury did not know what to do if it did not unanimously agree on the firearm possession charge. 9RP 188. The prosecutor thought it indicated the jury might be hung on this issue. 9RP 187. The court thought it was a good question. 9RP 188.

Instruction 48 was an eight-page instruction explaining the deliberative process to the jury. CP 137-44. It went through each charged count and directed the jury to fill in the verdict forms with "not guilty" or "guilty" "[i]f you unanimously agree on a verdict." CP 138-44. It also told the jury that "each of you must agree for you to return a verdict." CP 144.

But Instruction 48 did not contain any mention of the nature of the agreement required for the special verdict forms. Unlike the charged counts, the jury was not asked to render a "not guilty" or "guilty" verdict for the special verdict findings. CP 69-71, 81. Instead, the forms asked for a "yes" or "no" answer to whether King

was armed with a firearm at the time of the commission of a certain charged crime.

Not only did the jury's note show it was confused by whether its verdict needed to be unanimous, the prosecutor thought the instructions in general were "some of the most confusing jury instructions that I have done." 9RP 41. Due to the many charges and lesser included offense instructions, combined with the separate to-convict instructions for each co-defendant, the instructions were long and hard to parse. CP 97-144. What it is clear from the record is that nowhere in the instructions was the jury told that its verdict in the special verdict forms must be unanimous or its decision must be based on proof beyond a reasonable doubt.

c. Failing to instruct the jury on how to reach a verdict for the firearm enhancements requires reversal.

The deliberative process requires accurate instruction so the jury understands the nature of the verdict it must render. When the jury is inaccurately instructed about whether unanimity is required to reach a verdict on an aggravating factor, that error vitiates the verdict because it was not reached with a proper understanding of the law. The failure to instruct the jury that its special verdict required any particular unanimity or standard of proof undermines

the verdicts obtained. The court cannot speculate as to how or why the jury reached its verdict. Sullivan, 508 U.S. at 279; Williams-Walker, 167 Wn.2d at 899-901. The court is authorized to impose a firearm enhancement only when the jury has reached its verdict beyond a reasonable doubt and by unanimous agreement. Williams-Walker, 167 Wn.2d at 898. The court lacked authority to impose firearm enhancements upon King because the jury's special verdicts do not reflect its determination that the State proved the firearm enhancements beyond a reasonable doubt.

The reviewing court may not extrapolate that the jury would have voted "yes" on the special verdict had it been properly instructed because it convicted King of assault based on a deadly weapon and unlawful possession of a firearm. The verdicts required for those charged offenses did not contain identical elements to the firearm enhancement. The deadly weapon required for second degree assault could be a firearm, whether loaded or unloaded, and without regard to its ability to fire an explosive such as gunpowder. CP 100-01. Unlawful possession of a firearm did not require evidence the firearm bore any nexus to a particular charged offense, but rather that King owned or had in his control a firearm. CP 131; see State v. Brown, 162 Wn.2d 422, 431, 173 P.3d 245

(2006) (explaining mere presence or constructive possession of firearm insufficient to show nexus required for enhancement).

Moreover, the inviolate right to trial by jury bars the court from imposing a sentence not expressly authorized by the jury, and jury authorization requires the jury to find the prosecution proved each element of the firearm enhancement. See Williams-Walker, 167 Wn.2d at 889, 900. When the jury's verdict on a special verdict enhancement is not based upon an accurate understanding of the deliberative process, the court cannot know "what result the jury would have reached had it been given the correct instruction" and the error cannot be deemed harmless. Bashaw, 169 Wn.2d at 147-48. The lack of instruction as to how the jury should reach its decision on the special verdicts undermines the court's authority to impose firearm enhancements against King.

5. **The prosecution urged the jury to convict King by disparaging defense counsel, misrepresenting the law, and vouching for its witnesses**

a. A prosecutor may not use improper tactics to gain a conviction.

Trial proceedings must not only be fair, they must "appear fair to all who observe them." Wheat v. United States, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). A prosecutor's misconduct violates the "fundamental fairness essential to the very concept of justice." Donnelly v. DeChristoforo, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 21, 22.

Prosecutors play a central and influential role in protecting the fundamental fairness of the criminal justice system. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). A prosecutor is a quasi-judicial officer and has a duty to act impartially, relying upon information in the record. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935).

Because the public expects that the prosecutor acts impartially,

> improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry

> much weight against the accused when they should properly carry none.

Berger, 295 U.S. at 88.

b. The prosecution disparaged King for exercising his right to have a trial.

A person accused of a crime has a constitutional right to confront witnesses against him, and to have the State prove its charges against him at a jury trial. Crawford v. Washington, 541 U.S. 36, 54, 68, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004), U.S. Const. amend. 6 (guaranteeing a defendant the right, "to be confronted with witnesses against him."); Wash. Const. art. I, § 22 (guaranteeing the accused the right "to meet the witnesses against him face to face"). When a prosecutor comments on an accused person's exercise of the constitutional right to have a trial, it undermines that right. "The State may not draw adverse inferences from the exercise of a constitutional right." State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984) (comment on defendant's lawful possession of firearms); State v. Fiallo-Lopez, 78 Wn.App. 717, 728, 899 P.2d 1294 (1995) (comment on defendant's failure to testify). Any such error must be proven harmless beyond a reasonable doubt. State v. Easter, 130 Wn.2d 228, 236, 242, 922 P.2d 1285 (1996).

Additionally, the State may not disparage the role of defense counsel. State v. Gonzales, 111 Wn.App. 276, 282-83, 45 P.3d 205 (2002). A "primary interest secured by the Confrontation Clause . . . is the right of cross-examination, the principal means by which the believability of a witness and the truth of his testimony are tested." State v. Martin, 171 Wn.2d 521, 536, 252 P.3d 872 (2011) (internal citations omitted).

The prosecutor acted as if King should be blamed for forcing the complaining witnesses to come to court and testify about what happened. She told the jury it was "certainly appropriate" for the complainant to get "annoyed" during cross-examination. 9RP 96.[2] This comment urged the jury to hold it against King that Rosier was required to have his statements to police and investigators scrutinized. It encouraged the jury to put aside their reasons to doubt the complainant's testimony based on the fact that defense counsel made it unpleasant for them to testify.

[2] King appears to have objected but the transcript has an "inaudible." 9RP 96. The trial transcripts, compiled from a tape-recorded trial, are rife with inaudibles and transcription errors. It seems impossible to re-create the nature of an objection spontaneously rendered during closing argument, but King has no opposition to a reference hearing on the "inaudible" portions of the transcript at the court's discretion.

The prosecutor told the jury that Rosier and Johnson should be found credible because they had nothing to gain by testifying but "a lot to lose." 9RP 99. "They have got a lot to lose by being part of this process," the prosecutor contended. Id.

What they had to "lose," according to the prosecutor, was "their privacy." Id. "They were asked a whole lot of questions about themselves, what they do, what they were doing that night. They expose themselves to shame and embarrassment." Id. Thus, the prosecution disparaged King for simply questioning the complainants about the incident, as if the defense abused the purpose of cross-examination.

Then the prosecutor complained about King's questioning of Rosier's truthfulness regarding his employment. When King asked Rosier about whether he claimed he was an "engineer" when he was in fact a janitor, the prosecutor faulted King for asking such questions. The prosecutor asserted, "that was embarrassing for Rosier." 9RP 100. The prosecutor argued, "Do you think that might have been a little bit embarrassing for Mr. Rosier when he [was] talked down to like that by an attorney?" 9RP 100. A potential objection that registered as "inaudible" followed that comment. Id.

The prosecution told the jury that "testifying was pretty terrifying for Johnson." 9RP 96. King appears to have objected but what he said was inaudible. Id. This comment again reminds the jury that King should be faulted for further terrorizing Johnson by requiring her to testify.

The prosecutor's arguments portrayed King as illegitimately prying into the complainant's lives. King had a constitutional right to ask his accusers "what they do, what they were doing that night," and whether they were less than candid in any of their testimony or during prior interviews. The prosecution was not free to disparage King for exercising his constitutional right to confront his accusers, and improperly argued that the jury could draw an adverse inference against him based on his exercise of his constitutional rights.

c. The prosecution asserted the complainants would have been charged with a crime if they lied.

A prosecutor commits misconduct by urging that other legal repercussions ensure the credibility of witnesses' testimony. United States v. Witherspoon, 410 F.3d 1142, 1146 (9th Cir. 2005). This type of argument constitutes improper vouching based upon matters outside the record. Id. It also places the prestige of the

prosecutor's office behind a witness by personally assuring the jury that the prosecution would charge the witness with a crime if it did not believe in the witness's veracity. Id.

"Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony." Id. (quoting United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993)).

In Witherspoon, the prosecutor responded to the defendant's claim that the police officers were lying by arguing that it did not make sense that they would lie because they if they do, they "risk losin' their jobs, risk losin' their pension, risk losin' their livelihood. And, on top of that if they come in here and lie, I guess they're riskin' bein' prosecuted for perjury." 410 F.3d at 1146.

The Ninth Circuit Court of Appeals concluded, "That statement was clearly improper." Id. The prosecutor may not bolster a witness's credibility by implying that she would be prosecuted for perjury if she lied. Id.; see also State v. Mussey, 893 A.2d 701, 706 (N.H. 2006) (adopting Witherspoon's analysis of impropriety underlying prosecutor's argument that witnesses would face legal or employment consequences if lied).

Here, the prosecutor told the jurors to think about Rosier and Johnson's "criminal liability" when evaluating their credibility. She said, "they expose themselves to criminal liability for making something like this up." 9RP 100.

No one testified that Rosier and Johnson would be prosecuted if they lied. Neither said they were aware of the possibility of a perjury prosecution. The "criminal liability" consequences of their testimony was not part of the evidence in the case, and therefore was an improper argument.

d. The prosecutor attested to the credibility of the complaining witnesses.

It is "extremely prejudicial" as well as unethical for a prosecutor to "impress upon the jury the deputy prosecuting attorney's personal belief in the defendant's guilt." State v. Case, 49 Wn.2d 66, 68, 298 P.2d 500 (1956); State v. Sargent, 40 Wn.App. 340, 343-44, 698 P.2d 598 (1985), rev'd on other grounds, 111 Wn.2d 641 (1988); see United States v. Young, 470 U.S. 1, 18, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (prosecutor's expression of personal opinion of guilt is improper).

The prosecutor impermissibly vouches for the credibility of the witness by telling the jury he or she was being truthful. State v.

Ramos, 164 Wn.App. 327, 341 n.4, 263 P.3d 1268 (2011); State v. Fleming, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997). In Ramos, the prosecutor told the jury that "the truth of the matter is they [the police officers] were just telling you what they saw and they were not being anything less than 100% candid." This Court ruled that this remark constituted improper vouching for the credibility of a witness. Id.

A prosecutor also impermissibly vouches for a witness's credibility by telling the jury that information not presented at trial supports the witness's testimony. State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). Because jurors presume that a prosecutor has a wealth of experiential knowledge beyond the facts of the particular case, when a prosecutor discusses facts not in evidence the jurors inevitably conclude that the prosecutor speaks from her experience United States v. Brooks, 508 F.3d 1205, 1209-10 (9th Cir. 2007) (prosecutor "threatens integrity" of conviction by indicating information not presented to jury supports government's case). A prosecutor "carries a special aura of legitimacy" as a representative of the State. United States v. Bess, 593 F.2d 749, 755 (6th Cir. 2000). Thus, "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust

the Government's judgment rather than its own." Young, 470 U.S. at 18-19.

The prosecutor spent a substantial portion of her closing argument discussing the credibility of the complaining witnesses. She repeatedly told the jury that Johnson and Rosier were not "perfect" witnesses, without explaining what that meant, but implying that the prosecutor had seen better witnesses in her experience in other cases. The prosecutor also repeatedly assured the jury that Rosier and Johnson's testimony was "appropriate."

The prosecutor agreed that neither Rosier nor Johnson had "perfect" memory of the incident. 9RP 95. "But it was appropriate under the circumstances." Id. The prosecutor further explained, Johnson's memory was not as detailed as Rosier's, but still sufficiently "appropriate": Johnson's memory "was not as much as her husband but still appropriate around the details." Id.

The prosecutor next addressed the complainants' demeanor, and said, "That was appropriate under the circumstances." She also said it was "appropriate" for Rosier to get annoyed during cross-examination. 9RP 96.

On the topic of inconsistencies in their testimony, the prosecutor reminded the jury, "as I said before, Ms. Johnson's

testimony, it wasn't perfect but it was appropriate under the circumstances." 9RP 98.

She continued, "And similarly Mr. Rosier's testimony was not perfect but appropriate." 9RP 98.

By reassuring the jury that both complainants' testified "appropriately," the prosecutor injected her own experience and judgment into the jury's deliberations. The jury would understand her argument to mean that as an experienced prosecutor, she could verify that the witnesses gave the type the testimony that was "appropriate." If they lied, they faced criminal liability, which again assured the jury that the State was testing and vouching for the credibility of these witnesses. See Brooks, 508 F.3d at 1209-10; Ish, 170 Wn.2d at 198.

e. The prosecution improperly suggested that defense counsel misrepresented the law.

"It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity." State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011). When defense counsel said he had not heard the basis of an objection to his closing argument, the prosecutor turned to him and said, "You misrepresented the testimony." 9RP 134. Defense

counsel asked for a side bar, but the court refused, ruling, "Counsel, continue moving forward," which implicitly endorsed the prosecutor's assertion. Id.

When the prosecutor began her rebuttal argument, she started by dismissively saying, "What the heck is he talking about?" 9RP 153. She contended that the argument King's attorney made was "based on extreme misrepresentation. I could be here all night picking out misrepresentations." 9RP 154. She argued that the jury could not rely on defense's counsel's argument. 9RP 154. The prosecutor made a further comment that is not intelligible from the transcript but which prompted defense counsel to object to "burden shifting." 9RP 154. The court overruled the objection. Id.

The prosecutor's claim that King misrepresented the law was based on a central aspect of King's defense, which was that Rosier claimed the gun was King's because Rosier knew it was unlawful to have a gun in his car without a permit. King had adduced testimony at trial about the illegality of possessing a gun without a permit outside one's home. 6RP 65; 8RP 113. Near the start of King's closing argument, he told the jury that it was the man who had the gun at his feet "could be" facing charges. 9RP 133. He argued Rosier knew it was a "crime for him to possess a weapon without a

concealed weapons permit." Id. The prosecutor objected and the court sustained the objection. Id. When defense counsel asked for clarification, the prosecutor interjected, "You misrepresented the testimony." 9RP 134. Defense counsel asked for a side bar, but the court again refused, ruling, "Counsel, continue moving forward." Id.

In the prosecutor's rebuttal argument, she denied that Rosier would need a concealed weapons permit to have a gun in his car. 9RP 159. She insisted, "The evidence in this case is that it is not a crime for Mr. Rosier if that gun belonged to him . . . ." 9RP 159. King objected that this argument was contrary to the law and the testimony of witnesses. The court overruled this objection. 9RP 160. The prosecutor then repeated, "It's not a crime for Mr. Rosier to have a gun in the car." Id.

King complained about this ruling as soon as closing argument was over and later in an argument for a new trial. 10RP 5-8. He explained that by sustaining the prosecutor's objection at the start of his argument, when his argument was based on his good faith belief in the trial testimony, impacted the rest of his closing argument. Id. He felt constrained and afraid to draw inferences he had intended to draw. Id. The court refused to rule on

the motion without a transcript of the closing argument and deferred to the appellate court to review the issue. 10RP 18.

f. Prosecutorial misconduct requires reversal.

The danger of prosecutorial misconduct is that it "may deprive the defendant of a fair trial. And only a fair trial is a constitutional trial." State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978) (citing State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956)). Though individual errors may not alone be sufficient to warrant reversal, the cumulative effect of the errors may deprive a defendant of a fair trial. State v. Jerrels, 83 Wn.App. 503, 508, 925 P.2d 209 (1996). Where improper statements are not objected to, reversal is still required when no jury instruction would have cured the problem. Ramos, 163 Wn.App. at 340.

In the case at bar, the prosecutor engaged in numerous, pervasive instances of attempting to sway the jury based on matters that were both irrelevant and inflammatory. The record makes it difficult to parse the number and nature of objections, due to inaudible comments. Even if some comments were not objected to, the prosecution used improper tactics as "a prism by which the jury should view the evidence," and no single instruction could cure those repeated improprieties. Ramos, 164 Wn.App. at 340.

The inconsistency of the verdict shows that the prosecution's case rested on tenuous grounds. The jury rejected the State's principle theory that Walker was directing King to hold the complainants with his unloaded gun, and convicted him of misdemeanor offenses. The trial court acknowledged this verdict was inconsistent. 10RP 17.

An underlying problem with the prosecution's case was that the story told by the complainants seemed hard to believe. Their credibility was further undermined by the ways that had exaggerated or downplayed various issues such as how many drinks they had and where they worked. 6RP 62-63, 65, 139, 162. The prosecutor used her closing argument to shore up those concerns by illegitimate means, such as by telling the jury that the complainants faced criminal liability if their testimony was untruthful, and by disparaging King for invading the complainants' privacy by questioning them at trial. These improper comments could not be cured by an objection because they were the prism through which the jury was repeatedly told to view the case, and the improprieties undermine the fairness of the trial.

F. CONCLUSION.

For the reasons stated above, Marcelis King respectfully asks this Court to reverse and dismiss his convictions for which there was insufficient evidence and double jeopardy violations. The court should order a new trial due to the improper charging of felony harassment improper arguments by the prosecutor that tainted the fairness of the trial. In the absence of a new trial, the court should reverse and dismiss the firearm enhancements based on the lack of adequate jury verdict.

DATED this 29th day of February 2012.

Respectfully submitted,

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